Will the Commission know whether the accessible product is positioned so as to appeal to a specialized market sector, or as a product with enhanced features for the general market?

Without knowledge on these points, market and other estimates and projections made by various entities have no real meaning. Nor can the estimates made by different entities be compared. Will the Commission have any information on these points? Should the Commission care? The Commission has invited commenters to discuss many of these issues, but that discussion of them in principle is not the issue.

Again, no issue exists regarding the trustworthiness or reliability of companies' representations. But in this new area of accessibility, where there are so many predictable and so many ad hoc decisions to be made, where everyone involved faces a steep learning curve, the need to put information and raw data into a meaningful interpretive framework is especially pressing. It is not a question of taking industry's word for things or not taking industry's word. It is a question of knowing what those words mean.

SUBCOMMENT (g) A READILY ACHIEVABLE SCENARIO

It may be useful here to suggest how we think a readily achievable assessment could and should work. An entity claiming that making a covered device or service accessible or compatible is not readily achievable should be expected to indicate why. That is, it should be expected to indicate which of the readily achievable factors (technical infeasibility, excessive cost or impracticality) accounts for its determination. Also the entity should be expected to explain how such preclusive factors apply. That is, why is accessibility or incompatibility technically infeasible, or what are the cost that would be incurred?

A covered entity should likewise be expected to document that accessibility was taken into account at the earliest possible point in the product/service development process. This expectation does not presuppose any formal documentation or any specific kind of record-keeping. It merely indicates that the entity should have some credible way of tapping into its collective memory if and when questions arise.

In those instances where accessibility or compatibility is not readily achievable at the time an inquiry or complaint is made but would have been possible at an earlier point in the product life cycle, the entity should be expected to invest the resources needed to correct this avoidable problem, even though such resources would not have been legally required or technically needed if accessibility had been considered in a more timely fashion.

In instances where an entity contends that accessibility or compatibility are adequately provided by other similar devices or services, it should nevertheless be prepared to show why it is not also readily achievable to provide accessibility for the particular offering in question. Where this similar source argument is made, the covered entity should also be prepared to

show how each major advertised function, feature or capability is in fact accessed through the allegedly comparable products.

Additionally, in those cases where an entity alleges that a device or service is accessible or compatible, it should be prepared to demonstrate how, and it should be further prepared to provide the usability and customer support services necessary to render these access strategies meaningful to the consumer. To that end, a covered entity should be prepared to tell the Commission how the accessibility of the various functions, features and capabilities were evaluated and tested, and whether the entity has any direct knowledge of people with the disability in question actually using them.

Finally, in those cases where a product or service cannot be made accessible or compatible, the entity should be prepared to demonstrate that it has some procedures in place for ensuring that accessibility will be incorporated into any subsequent iterations of the product as soon as it becomes readily achievable to do so. Again, no particular method for doing this need be prescribed; it is sufficient that each covered entity find its own method for monitoring this process and for being able to explain its method if and when asked.

COMMENT 14 (re paras. 124-161)

NCD appreciates the efforts the Commission has made to balance a number of important but potentially conflicting objectives in its establishment of complaint and enforcement processes for Sec. 255. We will address the questions posed by the Commission in the following subcomments.

SUBCOMMENT (a) THE FAST-TRACK COMPLAINT PROCESS

The Commission regards its proposed fast-track process for informally and speedily settling disputes as the core of its enforcement strategy (para. 126). Consequently the Commission devotes a great deal of attention to the procedural aspects of this process. While implementation of the right procedures is critical to the effectiveness of fast-track, an equally significant variable should also be noted. If fast-track is to succeed in resolving most complaints, complaints will have to be of a nature that can be resolved informally within a short period of time. It would be helpful to get a sense of the Commission's expectations as to the kinds of complaints likely to be filed.

A number of complaints are likely to involve issues that cannot be resolved quickly or easily. A complaint based on the fact that a cellular phone provides important status information only in a visual form, if true, is not likely to be resolved by fast-track. A complaint that an item of CPE lacks appropriate hearing aid compatibility is similarly, if true, unlikely to be resolved by fast-track.

The Commission recognizes (para. 137) the need for a mechanism to terminate fast-track where it is unlikely to lead to a mutually-satisfactory solution. It should also consider developing mechanisms for bypassing fast-track entirely where the dispute of such a nature as to make informal resolution unlikely.

SUBCOMMENT (b) INITIAL CONTACT

The Commission indicates (para. 128) that it will encourage consumers to contact manufacturers or service providers directly before filing a complaint. Some uncertainty seems to exist as to how forceful this encouragement will or should be. We urge the Commission to take steps to ensure that persons contacting it with a view to filing complaints are made to understand that they are in no jeopardy of Commission disapproval if they decide to begin the complaint process immediately.

SUBCOMMENT © COMMUNICATION FORMATS AND MODES

In discussing the issues associated with communication among the Commission and the parties to the complaint process, the Commission indicates (para. 131) that the complainant should indicate a preference of method by which to be contacted. One of the options listed is to request being contacted by letter, but there is no indication whether this will include the option of receiving a braille or audio cassette letter. The Commission does clearly indicate that complainants may write to it in any medium including braille or audio cassette. We therefore assume that the Commission expects to be able to respond in these formats as well.

Similar issues are raised throughout this part of the NPRM regarding communications between the Commission and respondents, and between respondents and complainants (e.g. para. 139). We believe that it would be of great educational value for telecommunications equipment manufacturers and service providers to learn to communicate in nonprint formats. We also understand that the Commission may be reluctant to impose on such entities the duty of responding to and of generating communications in alternative formats under conditions of limited time.

Accordingly, we would suggest that the Commission not specify the use by respondents of any particular formats or communications modes. What it should require is that they find a means of communicating effectively with each complainant, and that in the case of any dispute over whether effective and timely communication has taken place, the burden of proof be heavily on the respondent.

SUBCOMMENT (d) DURATION OF FAST-TRACK PROCESS

The Commission proposes (para. 135 et seq.) that a five business-day period be allotted for the fast-track process. The Commission expects (para. 141) that an action report should ordinarily be forthcoming from the respondent by the end of this five-day period. In those instances where five days is not sufficient to resolve the complaint, but where it believes that the fast-track process will prove successful, the Commission reserves the right to grant an extension.

The Commission asks whether any outside time limit should be placed on the fast-track process, including extensions. NCD believes that five days will not be long enough for the resolution, or even in many cases for the investigation, of many Sec. 255 complaints. We think it likely that many extension requests will be made. Rather than forcing the parties to go through a two-step fast-track process of initial complaint followed by extension request, we recommend that the initial fast-track period be lengthened but that the Commission grant no extensions beyond this lengthened initial period. We recommend that 20 business days should ordinarily be sufficient to balance the objectives involved.

SUBCOMMENT (e) UNDERLYING COMPLIANCE PROBLEMS

We appreciate the Commission's desire (e.g. paras. 138, 140) to use the complaint process as a means for identifying underlying compliance problems. This role of the complaint process is indeed a separate role from that of resolving the problems of individual complainants. Nevertheless, we think that the Commission has not clearly enough distinguished between the procedures it will use when compliance is the only remaining issue after fast-track and the procedures it will use when consumer satisfaction also remains an issue. In those cases where the fast-track process results in a satisfactory resolution for the consumer but in which compliance issues remain, there may or may not be a need for the consumer to remain actively involved in the case. Of course, the Commission should always ensure that the consumer is fully informed of what happens, but unless the consumer wishes to remain involved, or the consumer's evidence is critical to the case, the Commission may well be in a position to continue the matter on its own, pursuant to its applicable administrative procedures.

The discussion in the NPRM should better highlight this possibility and should give consumers a better sense of what their level of involvement is likely to be in all phases. The Commission discusses at considerable length its desire to minimize the burdens on complainants and the steps it has taken to accomplish this goal. But for the ordinary citizen, unfamiliar with administrative proceedings of any kind, many questions remain. Would I ever be required to testify? Would I ever have to make statements under oath? Do I risk anything if my complaint is not successful?

In other words, what we are recommending here is a more person-oriented description of the complaint process. What we have now is primarily a process-oriented description. That

is valuable, but unfortunately, it is most valuable to those who already know something about these kinds of processes.

SUBCOMMENT (f) CONSUMER SATISFACTION

It is not clear whether the complainant will have an opportunity to comment on the respondent's fast-track action report. The Commission must ensure that its determinations of whether fast-track has resolved the complainant's problem are not based on the respondent's opinion of whether the problem has been solved. The Commission should be in touch with the complainant before it decides whether fast-track has worked. Waiting to talk to the complainant by communicating its decision (para. 142) is too late. Such a structured contact would also afford the Commission an opportunity to make certain that the complainant understands the additional procedures that are available and how to request them (para. 143).

SUBCOMMENT (g) POST FAST-TRACK

The Commission expresses its intention to resolve those complaints not settled by fast-track through informal processes. The Commission though also reserves the right to utilize formal complaint processes. It indicates that these will be available only if the complainant requests them and only if the Commission approves (para. 147). It would be helpful for the Commission to elaborate on the circumstances that would incline it toward use of such formal procedures. While we recognize the Commission's understandable desire to get some experience with Sec. 255 complaints before finalizing all its rules, we think that some further explanation of how it plans to exercise its discretion to allow formal complaints would be very helpful in giving both consumers and industry a better sense of what they may expect in the months and years to come.

In particular, we would strongly urge the Commission to indicate what efforts it will make to collect "patterns and practices" information and what use it will make of such data in determining the existence of underlying compliance problems or in deciding whether or not to approve requests for formal complaints.

SUBCOMMENT (h) STANDING

We agree with the Commission' decision (para. 148) not to impose a "standing" requirement for complaints under Sec. 255. The harm done by inaccessibility is not merely to the individual. That harm is in a very real sense done to society, and anyone who is aware of it should have the right to protest.

Moreover, even if we assumed that some individualized showing of harm were required to justify a Sec. 255 complaint, there would certainly be cases where real harm was done to people who are not the users of the inaccessible equipment or services. For example, if I am prevented from hiring a highly-qualified job applicant because of the inaccessibility of the CPE in my office, I am harmed every bit much as the applicant is. If I am prevented from talking to my loved one over the phone because the telecommunications system is inaccessible to that person, the harm to me is poignant and real.

SUBCOMMENT (I) TIME LIMITS

We believe the Commission is correct (para. 149) in declining to impose time limits (a statute of limitations) on the filing of complaints under Sec. 255. Inaccessibility is not an all-or-nothing matter. Sometimes the inaccessibility of a particular feature of one's equipment or of a particular telecommunications service may not become apparent until you try to use it. Even then, given the complexities of the telecommunications system, it may take a while to realize that inaccessibility or incompatibility, rather than one's own lack of skill, is the real problem.

We also believe that at least initially, no time limit should be imposed on the decision whether to pursue a complaint beyond the fast-track process. An individual may initially be satisfied with a solution only to find later under different conditions of use, that the solution doesn't really work. A consumer may accept the conclusions of the respondent that no solution exists only to learn later that one did exist of which the respondent was genuinely unaware. Because of these and similar possibilities, the Commission should await some experience of the 255 process before imposing any time limits on what is essentially the right to appeal.

SUBCOMMENT (j) JOINDER

We agree with the Commission's decision to allow complaints to be brought against multiple defendants or to be brought by more than one party. We believe however that the joinder issues most likely to arise in the Sec. 255 context will be of a different sort. Typically, they will involve the claim by a defendant that some other entity is responsible for the alleged inaccessibility.

Given the complex interaction between telecommunications and network equipment, CPE and software, analysis of the source of an accessibility problem can often be exceedingly difficult. The Commission recognizes this and has developed ample means for dealing with it. What concerns us is the situation where an equipment manufacturer and service provider are more interested in blaming one another than in taking nay responsibility for solving the

problem. Equally troubling is the situation where a manufacturer and a service provider go through the motions of blaming one another but do so with the concerted purpose that neither shall be held responsible.

The Commission needs to develop procedures, incentives and sanctions to quickly identify and effectively deal with these situations. Moreover, the Commission should develop some procedures that will allow consumers to file complaints, even when they are bewildered by the array of companies involved and genuinely have no idea which one is the appropriate respondent. Also, the Commission should clarify the effect if any upon the time frames applicable to the fast-track process of cross complaints ("interpleader" in legal parlance) by respondents against other entities who they claim are the real cause of the problem.

SUBCOMMENT (k) MONETARY FEES

With respect to the complaint process proposed by the Commission, another concern must be noted. The Commission proposes to charge a fee for filing informal complaints. We believe this to be unwise and potentially unfair. Imposition of such a fee is unprecedented in the annals of civil rights enforcement and would inevitably represent a barrier to many people with disabilities, who still tend to be unemployed and poor.

NCD appreciates the Commission's probable motive in proposing this fee. We assume the Commission is seeking to deter frivolous or unfounded complaints and that it generally seeks to minimize the volume of complaints requiring formal adjudication. These legitimate concerns can be amply met in other less harmful ways. In fact, by proposing to retain discretion over whether or not to grant the right to make a formal complaint, the Commission has already provided the safeguards that it needs. Since the Commission proposes to reserve the right to refuse to allow formal complaints, there is no need to impose a fee in order to deter frivolous or unfounded complaints.

Even FCC discretion to permit formal complaints is of some concern to NCD. We note that the Air Carrier Access Act of 1986 did not guarantee individuals with disabilities the right to formal adjudication of complaints, and its enforcement has been substantially lacking over the years. Mediation and other non-confrontational means of conflict resolution often work because the parties possess a formal process as an alternative. While encouraging cooperation, why not still give citizens the absolute right to a formal complaint?

SUBCOMMENT (l) COMMISSION STAFF INVOLVEMENT

In the effort to make the complaint process effective but minimally intrusive, the proposed rules place great emphasis on the role of the Commission as a formal and informal participant in the complaint resolution process. Among other prescribed duties, Commission staff will receive and refer complaints; receive and evaluate action reports; confer with complainants; provide or locate technical assistance; recommend whether requests for formal complaint status should be granted; maintain equipment manufacturer and service provider contact lists; and generally provide the Commission's good offices in a number of settings.

The proposed role of the Commission will be of great value to the disability community and to industry, but that role cannot be fulfilled unless adequate staffing, training and other resources are committed to the effort. The Commission gives no indication of the level of staffing or the type of personnel who will be involved in the management of the complaint process, and it gives no indication of the amount or kinds of training in accessibility issues, in alternative communication modes and formats, in the requirements of the law, or in other matters that will be crucial to the effective carrying out of the Commission's role. We urge the Commission to provide further insight into these matters so that all interested constituencies can have a basis for assessing their likely impact.

SUBCOMMENT (m) TECHNICAL RESOURCES ASSISTANCE

In furtherance of its goal of utilizing a largely informal complaint process, the Commission proposes to make use of arbitration, mediation and other forms of alternative dispute resolution in cases where the fast-track process fails to bring about a satisfactory resolution between the parties. The Commission also proposes to be of assistance to manufacturers and service providers by helping them to find appropriate technical assistance resources who can advise them in resolving accessibility issues.

The Commission does not indicate exactly what technical assistance resources it has in mind or what resources it believes currently exist that could fulfill these roles. Based on Section 6 of the TAAC Report, we suggest that an organization like the Association of Access Engineering Specialists might well perform a useful role in connection with many of the needs mentioned by the Commission.

SUBCOMMENT (n) PATTERN AND PRACTICES

By way of expanding upon an issue raised in subcomment (g) above, NCD urges the Commission to develop objective and widely-disseminated criteria for evaluating the performance of individual companies as well as the accessibility of various sectors and product/service groups. In this connection, we urge the Commission to express its support for and its intention to make use of any market monitoring system that the Access board may develop pursuant to the recommendations of the TAAC Report.

As it relates to various sectors of the market and to various categories of equipment or covered services, such a monitoring process will give the Commission potentially invaluable feedback regarding the adequacy of its guidelines and the possible need for additional enforcement. As it relates to individual entities, attention to pattern and practices (though not necessarily in the context of the market monitor reports) will give the Commission the background information necessary to identify when an apparently straightforward dispute may mask a serious or continuing problem of underlying compliance.

COMMENT 15 (re para. 167)

In discussing its handling of complaints under Sec. 255, the Commission indicates that one of the things it will look at is evidence of good faith on the part of the manufacturer or service provider. "Good faith" could be a highly subjective element. Fortunately, the Commission avoids this risk by listing a number of objective actions and circumstances that can be used to evaluate this issue.

We think the Commission has compiled an excellent list. Its use of one item though may inadvertently create some confusion. The item in question is "user information and support, such as descriptions of product accessibility and compatibility features. . . [and] end-user documentation (in accessible formats and modes) . . . ." Our concern here is that we believe that provision of such information, customer support and end-user documentation in accessible formats and modes to be a requirement of sec. 255 in its own right. It is the provision of just such support services and documentation that lies at the heart of the "usability" concept. We believe the Commission should make clear that failure to provide adequate documentation and customer support is not merely a factor to be considered in determining whether Sec. 255 has been violated, but is a significant and almost always avoidable violation of the law in itself.

COMMENT 16 (re para. 170)

In the debates over implementation of Sec. 255, the so-called product line issue has been one of the most contentious. We believe the Commission has analyzed this issue well and has dealt with it in an effective and balanced way. We agree that covered entities are required to evaluate the potential for accessibility of each product offering, and that in determining what is readily-achievable such entities may properly consider the degree to which other comparable products possess the required accessibility features. We do consider it important however that some further guidance be provided by the commission on the meaning of the term "functionally similar".

For example, the Commission should make clear that for this purpose, comparability would include price, features and functions, special promotional offers, warranty coverage and

general placement and positioning in the market. It should never be appropriate for a manufacturer to say that because its highest priced or its lowest priced or its largest or smallest version of some item is accessible to people with a particular disability, the need to make accessible other versions or models of the product is in any way reduced.

We note that any store generally only carries a few of a company's product line. Users are generally only aware of those products they see in the store. A very likely scenario resulting from "product line" thinking is that NONE of the phones that are actually in the store will be the accessible ones, Or perhaps there will just be one. It is highly unlikely that there will be an accessible model for each disability within each price range. Hence, choices theoretically available will NOT be in the stores where consumers shop. A salesperson is unlikely to know what a customer means who inquires about an accessible product equivalent.

The product line issue and the "conflicting accommodations" issue also need to be addressed in relation to one another. We urge the Commission to incorporate such further discussion into its final rule.

COMMENT 17 (re para. 172)

We agree that the Commission has the authority under Sec. 255 to prescribe a range of penalties for violation of the Act; we also appreciate the Commission's willingness to bring to bear the entire range of sanctions available to it under the Communications Act on behalf of accessibility. Nonetheless, we are concerned as to whether and how some of the available sanctions can be effectively applied in the telecommunications access setting.

For instance, what is the applicability of the Sec. 503(b) forfeiture jurisdiction to the Sec. 255 environment? Similarly, how does the Commission envision applying sanctions such as license revocation or construction permit withdrawal that were developed for purposes of regulating the broadcast industry? Also in this vein, when and how would the Commission foresee cease and desist orders as viable sanctions? Leaving aside for the moment the question of retrofitting, it seems that the only truly relevant and effective sanction available to the Commission in the 255 setting may be the imposition of fines. If this is so, and if the Commission does in fact regard fines or other monetary forfeitures as the principle sanction available to it when negotiation or remonstrance fail, we think it would be useful for the Commission to discuss the potential size of such penalties that might be available under current law. The Commission should express a view on whether such fines are likely to represent a potentially significant economic deterrent to willful and calculated disregard of Sec. 255. If not, the Commission may wish to join with responsible individuals and groups in urging Congress to provide enforcement mechanisms that will prevent any covered entity from deciding that the costs of compliance are greater than those of intransigence.

In order to make the authority of Sec. 255 credible, we believe the Commission must include retrofitting among the available sanctions. When the Commission determines that it would have been readily-achievable to make a covered equipment item or service accessible at the time it was developed, the Commission should not hesitate to impose a retrofitting requirement. Depending on the circumstances, this requirement could take the form of free upgrades, a mandate that the design be corrected immediately, a provision of a right to trade-up, a rebate to reflect the amount of functionality that was not available to customers with disabilities, or any of a number of other measures tailored to the circumstances of the case.

It should be no defense to a retrofitting order that provision of accessibility through retrofitting would be expensive. Since retrofitting should only be ordered in cases where flagrant disregard for the law has been established, entities subjected to this requirement should not be allowed to use cost as a means for escaping responsibility for their actions. In such cases, it is not merely the failure to provide accessibility that is at issue, but some knowing disregard for the law as well. To avoid any possibility of mistake, the retrofitting jurisdiction should not be retroactive to the enactment date of Sec. 255; rather, it should apply prospectively from the date the Commission's 255 regulations become effective and should apply to all design decisions made after that date.

COMMENT 18 (re para. 174)

The Commission seeks comment on whether any sort of Sec. 255 appliance certification process should be developed. Specifically it asks whether any sort of seal or imprimatur certifying compliance with Sec. 255 should be considered.

Without a parallel process for independently verifying claims made by covered entities for the accessibility of their offerings, we would answer the Commission's question in the negative. We hope that the commission will be able to work with industry and the disability community to develop strategies and resources whereby the accessibility of the telecommunications system can in fact be tested and verified. When the time comes that such techniques and resources are in place, we look forward to wholeheartedly supporting an appropriate certification regime.

CONCLUSION

In the foregoing comments, the National Council on Disability has identified and analyzed issues we believe to be of concern to telecommunications users with disabilities and to the telecommunications industry. We look forward to the development of the Commission's thinking and work in this key area of its jurisdiction and express our readiness to be of assistance in any possible way.